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April 1, 2002

The Honorable Howard Coble, Chairman
The Honorable Howard L. Berman, Ranking Member
Subcommittee on Courts, the Internet, and Intellectual Property
United States House of Representatives
B351A Rayburn HOB
Washington, DC 20515

Dear Congressman Coble and Congressman Berman:

This letter is in response to the request by the Subcommittee on Courts, the Internet, and Intellectual Property for public comments regarding online digital music issues relevant to the Copyright Act. The University of Louisiana at Monroe wishes to submit for the Subcommittee's consideration the attached comments discussing the Internet retransmission of non-commercial educational radio station KXUL.

The faculty of the ULM Department of Mass Communications believes that our students must be familiarized with all forms of mediated communication, including producing effective messages for the Internet. The Internet retransmission of KXUL therefore plays an important part of the complete education of our students. Internet retransmissions by non-commercial stations such as KXUL not only serve an educational function for the students originating broadcasts, but also expose geographically-diverse audiences to culturally-diverse programming.

The present language of the Copyright Act significantly threatens the ability of educational radio stations such as KXUL to continue their Internet presence. In the attached document we provide a detailed discussion of these issues in the specific context of KXUL; however, these same themes apply to a multitude of non-commercial radio stations across the nation. Our hope is that by learning about the comprehensive impact of the current statute on KXUL the Subcommittee can develop an appreciation for the greater need for remedial revisions to the Copyright Act. We believe that Congress can craft appropriate legislation that can both protect the interests of the copyright owners while preserving the service provided by the Internet retransmissions of non-commercial broadcasters.

We thank the Subcommittee for the opportunity to voice our concerns about digital music copyright issues, and ask for your most serious consideration of the attached comments.

Sincerely,

Joel R. Willer
Assistant Professor

Before the
CONGRESS OF THE UNITED STATES
House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

In the Matter of	)
ONLINE DIGITAL MUSIC ISSUES RELEVANT TO THE COPYRIGHT ACT	)

COMMENTS OF THE UNIVERSITY OF LOUISIANA AT MONROE, LICENSEE OF NON-COMMERCIAL RADIO STATION KXUL

Joel R. Willer
Assistant Professor of Mass Communications
April 1, 2002

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I. INTRODUCTION

The University of Louisiana at Monroe (ULM) files these comments as the licensee of non-commercial educational radio station KXUL. The House of Representatives Subcommittee on Courts, the Internet, and Intellectual Property has, in a notice dated March 12, 2002, solicited comments regarding online digital music issues relevant to the Copyright Act. Our comments herein discuss only copyright issues related to the retransmission of the programming of non-commercial educational radio stations by means of the digital network commonly referred to as the Internet.

The Subcommittee's invitation for comments expresses the desire to "address identifiable harms." We believe a comprehensive review of the impact of current regulations on one specimen application within the vast evolving digital environment will effectively contribute to the appreciation the Subcommittee seeks. Such an examination will provide a "human perspective" of a complex, and sometimes intangible, technological topic. However, the negative impact of the current statute, as we discuss in these comments, is not limited to KXUL – the same issues are of concern to scores of other non-commercial radio stations licensed to educational institutions nationwide. Additionally, many educational institutions remain unaware of the copyright implications of their Internet transmissions of musical compositions and recordings. Our comments are extensive, but we intend for our thoroughness to provide an inclusive understanding of the issues resulting from the applied statute.

KXUL views the use of digital technology to retransmit the programming of non-commercial radio stations as a natural extension of these stations' historical service. Non-commercial educational radio stations traditionally strive to program to otherwise underserved audiences with content not typically provided by their commercial counterparts. The further distribution of educational and cultural programming via the Internet allows non-commercial

radio stations to effectively extend their public service to a geographically-diverse audience. The Internet removes the physical boundaries imposed by an educational radio station's terrestrial radiofrequency transmission, allowing a greater audience to experience each non-commercial station's programming. The Internet began, in part, to support education; the continuing use of the Internet by non-commercial educational radio stations respects that tradition.

The Subcommittee should not overlook the benefits provided to copyright owners by non-commercial broadcasters' Internet retransmissions, unique in comparison to the relationship between copyright owners and commercial broadcasters. Educational broadcasters are likely to draw from a range of artists, recordings, and musical genres much broader than are their commercial counterparts. Congress has previously determined that Internet copyright policy should reflect "the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers." [17 USC §114(f)(2)(B)] Musicians themselves, the copyright owners, derive the benefit of extended exposure through performances on educational stations, as this broader range of artists and peripheral musical styles receive public introduction on educational stations they would not otherwise enjoy. Indeed, numerous artists and independent recording companies have publicly voiced concern that the demise of Internet retransmissions by non-commercial broadcasters would also harm the artists themselves.

In many ways, small non-commercial educational radio stations have been caught in the legal crossfire between two warring giants – the Recording Industry Association of America (RIAA), comprised principally of the five major recording companies, and large commercial services performing musical compositions and recordings by means of the Internet.

Copyright issues have already led a number of non-commercial education broadcasters to cease Internet retransmissions, and have caused still more to not even consider starting such services. In recent weeks and months many well-capitalized commercial music streaming services

have been forced from the Internet, citing the mounting costs of copyright compliance. The Internet retransmission services of non-commercial radio stations are even more vulnerable to a skewed economic model and to oppressive regulations. Without revision, the current statute has a strong probability of stifling the use of the Internet by non-commercial educational broadcasters. As the existing legislation continues to take effect, online music choices are likely to become further consolidated under just a few powerful commercial entities, many controlled by the large recording companies. The drastic reduction of voices on the Internet would diminish content diversity and lessen consumer choices for music-oriented Internet services.

II. BACKGROUND OF RADIO STATION KXUL

An understanding of the background of radio station KXUL is necessary to evaluate the impact of existing copyright laws on the station's Internet services. Information about the station's parent institution and broadcast operations provide a context for KXUL's associated Internet retransmissions.

ULM is a regional four-year state-assisted public institution of higher education, located in the northeastern portion of the state of Louisiana, offering a broad array of academic and professional programs through the doctorate degree. Undergraduate enrollment for the university is approximately 8,250 students as of the spring of 2002.

KXUL, a non-commercial educational radio station, obtained its first broadcast license from the Federal Communications Commission (FCC) in 1973. The station's "city grade" over-the-air signal covers a potential audience in excess of 211,500 people, and the station operates 24 hours each day of the year. International media research firm Arbitron estimates that, as of fall 2001, KXUL's weekly cumulative over-the-air audience is approximately 12,700 persons, with an estimated Average Quarter Hour (AQH) audience of 600 persons (Monroe, Louisiana Total Survey Area; Persons 12+; Monday-Sunday; 6 a.m.-Midnight).

KXUL is staffed principally by student and community volunteers and is administered by the academic Department of Mass Communications within the university's College of Liberal Arts. Mass Communications students may receive academic credit for their involvement with the radio station. ULM is accredited at the institutional level by the Southern Association of Colleges and Schools (SACS) and the ULM Mass Communications program is accredited at the departmental level by the Accrediting Council on Education in Journalism and Mass Communications (ACEJMC). A 1999 ACEJMC accreditation report listed among the strengths of the Mass Communications academic program an "[o]utstanding student radio station." The accreditation report also generally recognized the value of students' co-curricular involvement with KXUL in augmenting classroom instruction.

Funding for the operation of KXUL is derived exclusively from student fees levied by a popular vote of the ULM student body; KXUL receives no federal funding from the Corporation for Public Broadcasting (CPB). One member of the Mass Communications faculty serves as the station's supervisor, and the university provides the services of a part-time engineer to maintain the KXUL technical facilities. A small number of student staff members receive part-time work-study wages. KXUL has no full-time employees.

The station launched its first Internet site in 1996, and added live non-subscription re-transmissions via the Internet in 1998. KXUL presently operates audio "streams" in three separate formats, all representing retransmissions of its over-the-air programming. KXUL provides all of its own streaming and Web services. The radio station offers no advertisements on its Web site (http://kxul.com) or via its Internet audio streams. The amount of traffic KXUL can service with its Internet audio streams is restricted because of the limited network bandwidth the radio station shares with the rest of the university campus; the largest Internet audience KXUL has witnessed is 28 simultaneous listeners, aggregated from all three of its streaming

formats. KXUL has no plans to offer any "side channel" or interactive audio services by means of the Internet. In 2001, KXUL received a first place national award from the Broadcast Education Association (BEA) for Internet sites designed to entertain, with additional Exceptional Merit recognition for online interaction.

The ULM Mass Communications faculty believes that the thorough understanding of mediated communication necessitates exposing today's students to the use of new technologies, including producing effective content for the Internet. Students' experience gained as the result of KXUL radio's Internet presence and the station's streamed audio programming is therefore a vital part of the complete education of our students. Likewise, KXUL's Internet outreach makes the radio station's programming available to a worldwide audience that would not otherwise be able to experience the messages communicated by our students. The complex issue of copyright licensing has the very real potential to quell our use of this important learning experience.

ULM is the licensee of another non-commercial educational radio station, KEDM, which is an affiliate of National Public Radio (NPR) and Public Radio International (PRI). This second station receives a portion of its funding from CPB. KEDM formerly retransmitted its programming via the Internet and also made archival copies of some local programs available via its Web site. The general manager of that station has stopped both practices due to his concern over copyright issues related to content restrictions imposed by the Digital Millennium Copyright Act (DMCA) and because of unresolved Internet streaming issues with performance rights organizations. KEDM benefits from negotiations conducted by CPB and NPR with performance rights organizations and with the Recording Industry Association of America (RIAA), as well as from representation before Congress by these national organizations. The financial burden attributable to copyright royalty fees resulting from KEDM's Internet performances of licensed musical compositions and recordings has been borne by CPB utilizing taxpayer funding provided by

Congress. Even so, KEDM and its listeners have already been deprived of this important public service because of unsettled copyright issues.

III. DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

A. SECTION 114 CONTENT RESTRICTIONS

The DMCA extends a number of restrictions on the performance of licensed works, previously implemented by the Digital Performance Right in Sound Recordings Act (DPRA), to broadcasters who retransmit their programming over the Internet. Content limitations imposed on Internet digital performances by extension also significantly impinge on the content of the original broadcast performance to be retransmitted. The result is that some types of programs traditionally produced by broadcast radio stations are severely and negatively impacted. Particularly in the context of educational and cultural programming, these conditions of the DPRA and the DMCA seriously impair the abilities of non-commercial educational broadcasters such as KXUL to fully serve the public good.

Under Section 114 of Title 17 of the United States Code eligible non-subscription digital transmission services must not exceed the sound recording performance complement [17 USC §114(d)(2)(C)(i)]. The "sound recording performance complement" is defined in 17 USC §114(j)(13), limiting the transmission during any three-hour period to no more than:

1. Three (3) different selections of sound recordings from any one phonorecord, if no more than two (2) such selections are transmitted consecutively; or
2. four (4) different selections of sound recordings
    a. by the same featured recording artist, or
    b. from any set of phonorecords distributed together as a unit,

    if no more than three (3) such selections are transmitted consecutively.

The application of these conditions to a broadcast station effectively precludes the production of a program exploring the musical and historical legacy of a single specific artist. The radio programmer's artistic and scholarly pursuits, and the audience's social and educational experiences, are therefore quashed by the limits of the statute.

For more than two decades radio station KXUL has produced a daily 30-minute program entitled Jam Session. Each installment of this program features a single theme or a single recording artist. The program, when highlighting a single artist, is intended to place an individual composition within the context of the artist's greater body of work. The streaming of such an artistic and informative presentation via the Internet violates the current statute, despite the public interest served by the nature of this program. Likewise, the creation of a retrospective program at the time of an artist's passing would violate the law. How unfortunate it is that the statute prohibits a program on the Internet in remembrance of the likes of George Harrison, for example.

The common broadcast practice of announcing upcoming musical selections is also outlawed for Internet retransmissions as a result of the DPRA and the DMCA. The current statute requires that "the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists...." [17 USC §114(d)(2)(C)(ii)] Programming practices perfected over decades of broadcast history by radio legends such as Alan Freed, Bill Randle, Robert W. Morgan, Don Steele, and Dick Purtan are now prohibited for retransmitted programming under the statute. Lawmakers have, hopefully unwittingly, removed from the Internet an element that is part of the very essence of radio – a feature that audiences have come to expect from all radio broadcasts.

The statute does not allow a radio station to make available via the Internet archival copies of programs less than five hours in length. [17 USC §114(d)(2)(C)(iii)] Even such long-format programs that have been archived cannot be available for a period exceeding two weeks. Again, this prohibition restricts non-commercial educational broadcast stations from productively using the capabilities of the Internet to fulfill their important missions.

KXUL sister station KEDM previously made available on its Web site (http://kedm.org) archived recordings of selected locally-produced programs. This service was halted as a result of the provisions of the DPRA and the DMCA. [*supra*, at p. 5] Among the programs formerly archived on the KEDM Web site are AmericanaRama and Creole Statement: Music and Expressions of Louisiana Folklife. These programs – hosted by the director of the Louisiana Folklife Festival, who holds a doctorate in folklore – highlight respectively a rich mix of blues, Celtic, western swing, honky tonk, and singer-songwriters, and the diverse regional music for which Louisiana is known. Archived copies of neither of these programs comply with the limitations of the statute; therefore, KEDM has recently been forced to cease this important public service. Additionally, KEDM accompanied the archived recordings with playlists chronicling the music performances contained in each program. This additional practice violated the prohibition of advanced announcements of performances discussed above, notwithstanding the public service provided.

The content restrictions imposed by the DPRA and the DMCA on the Internet retransmissions of radio stations are presumably intended to protect copyright owners from unauthorized copying of their protected works. Internet retransmissions are not a significant threat the recording companies' retail sales because permanent copies of streamed music cannot be saved by an online listener. Therefore, the draconian measures heretofore implemented create protections much more restrictive than are necessary, and in the process gravely impinge on

legitimate artistic, educational, and cultural applications of the available technologies. Timely corrective actions by Congress will ensure content restrictions enacted by the DPRA and the DMCA will not obliterate the ability of non-commercial educational radio stations to effectively expand their public service to the Internet.

B. COPYRIGHT ARIBITRATION ROYALTY PANEL (CARP) REPORT

In the absence of any agreements between copyright owners and entities performing sound recordings voluntarily negotiated under the terms of the law, Congress directed the Librarian of Congress to convene a Copyright Arbitration Royalty Panel (CARP) to determine the "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." [17 USC §114(f)(2)(B)] The two voluntary negotiation periods under the provisions of the DMCA first began in October, 1998, and finally concluded in July, 2000. The RIAA petitioned the Copyright Office to commence the CARP process in July, 1999, and again in August, 2000. Direct cases before the CARP began in April, 2001, and rebuttal cases extended until October, 2001. The CARP heard oral arguments as late as January, 2002. The panel released its final report to the Librarian of Congress on February 20, 2002.

Only one entity representing non-commercial educational broadcasters, the National Religious Broadcasters Music License Committee (NRBMLC), participated for the entirety of the CARP proceedings. NPR initially filed notices to participate on its own behalf and on behalf of non-commercial public radio stations qualified for funding from CPB, but later reached a private settlement with the RIAA and withdrew from arbitration. The CARP report directly notes the difficulty in determining fair royalty rates for retransmissions by non-CPB non-commercial educational broadcasters as a result of the sparse participation in the arbitration process by such services:

> Unfortunately, determination of the willing buyer/willing seller fees for non-CPB affiliated, non-commercial radio stations ('non-CPB broadcasters') presents an extraordinary challenge. Despite admonitions to all counsel from the Panel as early as September 7, 2001 (well prior to the rebuttal phase), the record remains virtually barren respecting such broadcasters. *See* Tr. 9009-13. The record tells little about those non-CPB broadcasters that are represented by the NRBMLC, and virtually nothing about those that are not. [U.S. Copyright Office, CARP Report at pp. 89-90 (February 2002)]

Congress thoughtfully provided for a formal arbitration process between copyright owners and entities performing sound recordings. Why, then, did not more non-commercial educational broadcasters avail themselves of this opportunity, and how did this lack of participation impact the outcome of the CARP proceeding?

A debate over the scope of exemptions in the Copyright Act, as amended by the DMCA, resulted in a March 1, 2000 petition by the RIAA filed with the Copyright Office:

> ...asking that the Office determine the scope of the section 114(d)(1)(A) exemptions. Specifically, RIAA has requested that the Office adopt a rule 'clarifying that a broadcaster's transmissions of its AM or FM radio station over the Internet...is not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act.' [65 FR 14228 (March 16, 2000)]

The Copyright Office released a final finding as a result of this request on December 11, 2000, despite a petition from the National Association of Broadcasters (NAB) asking for the suspension of the rulemaking proceeding to await a ruling on an NAB motion for declaratory judgment filed in the U.S. District Court for the Southern District of New York. [65 FR 77292 (December 11, 2000)] The policy adopted by the Copyright Office specifically states that transmissions of a broadcast signal over a digital communications network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act. However, due to the pending ruling by the Court, the royalty status of broadcast retransmissions remained uncertain for some additional time. KXUL, like many non-commercial educational broadcasters with limited resources, was compelled to await the final outcome from the Court before expending limited finances and efforts toward the rate adjustment proceeding.

Non-CPB-funded non-commercial educational radio stations in general are characterized by extremely limited financial means. KXUL represents a specific subset of this group: broadcast stations operated by students as part of the educational mission of institutions of learning. Financial resources available to student-operated educational radio stations such as KXUL tend to be extremely inadequate, due to the non-commercial nature of licenses granted by the FCC and due to limitations in funding from parent institutions. Little recent data describing the financial status of student-operated stations has been collected on a nationwide basis, but a 2000 study of stations associated with campuses of the State System of Higher Education (SSHE) in Pennsylvania is indicative of the financial resources committed to such services. The study conducted by faculty members from the Indiana University of Pennsylvania investigated student-operated radio stations affiliated with thirteen (13) institutions, of that number eleven (11) were licensed as broadcast stations and two (2) operated non-broadcast services [B. Wilson and K. Dudt, "College Radios at Pennsylvania State Universities: A Status Report," *College Media Review* at pp. 4-9 (Winter 2001)]. For the licensed SSHE stations, annual direct funding ranged from a low of $5,000 to a high of $50,000. Mean annual direct funding for the licensed SSHE stations was only $17,227. KXUL, with an annual budget of approximately $70,000, has financial resources greater than the SSHE institutions, but nevertheless the station lacks the financial wherewithal to present a direct case in the extensive CARP proceedings.

KXUL, like all student-operated non-commercial radio stations, individually lacks the resources necessary to be represented before the CARP. Our station also does not enjoy the benefit of a well-funded national organization to provide effective collective representation in the arbitration process. The CARP report notes the difficulty national organization NRBMLC, the sole CARP participant partially representing non-commercial broadcasters, experienced in its participation: "NRBMLC struggles mightily to quantify a proposed rate founded in record

evidence." [U.S. Copyright Office, CARP Report at p. 90 (February 2002)] The CARP report also comments on the magnitude of the record developed during the proceedings:

> This proceeding has spawned one of the most voluminous records in CARP history. It includes a written transcript approaching 15,000 pages, many thousands of pages of exhibits, and over 1000 pages of post-hearing submissions by extraordinarily able counsel. [U.S. Copyright Office, CARP Report at p. 16 (February 2002)]

Participation in the arbitration process is clearly beyond the abilities of KXUL. Without the contribution of student-operated radio stations such as KXUL to counter the positions presented by the copyright owners through the RIAA, Congress can have no assurance that the CARP report satisfies the "willing buyer/willing seller" standard it has established. Indeed, only one of the two interested parties – the RIAA – has been heard in the CARP proceedings.

A number of small entities – including Wake Forest, North Carolina independent community radio station WCPE (FM) – individually attempted to submit focused *amicus curae* briefs to the CARP to explain factors relevant to such parties. Because these *amicus* pleadings can only be accepting if no CARP participant objects, the RIAA's subsequent opposition caused the Copyright Office to reject comments from all of these small parties. That WCPE anticipated presentation of a direct case in the CARP proceedings could cost the station hundreds of thousands of dollars gives support to the concern that the arbitration process is prohibitively expensive for small entities. Even if such small parties were to pool their efforts, the cost of voicing our position is unaffordable; therefore, the CARP process is inherently flawed.

The CARP recognized, and valiantly attempted to accommodate, the unique circumstances of non-CPB-funded non-commercial educational broadcasters – the CARP report recommends a royalty rate specific to the Internet retransmissions of such entities. However, the panel's determination is based exclusively on results of a previous public broadcasting compulsory license CARP report, and not on any evidence submitted in the recent proceedings:

> RIAA's methodology also suffers infirmities. Absent record evidence supporting a particular rate for non-CPB broadcasters, RIAA 'borrowed a ratio' from the Noncommercial Education Broadcasting Rate Adjustment Proceeding CARP Report. RIAA maintains that the panel awarded ASCAP and BMI approximately one-third of the sum they had requested as a royalty fee for the Section 118 public broadcasting compulsory license, and ASCAP and BMI had based their request on royalties paid by commercial broadcasters. Based upon this ratio, RIAA is 'willing to offer' non-CPB broadcasters a two-thirds discount from the commercial broadcaster rate. [U.S. Copyright Office, CARP Report at p. 92 (February 2002)]

The method the CARP used to determine even the commercial royalty rate is in itself suspect. The entire rate structure recommended in the CARP report is based on a single voluntarily negotiated agreement between the RIAA and Yahoo!, Inc., one of the world's leading Internet portals that also serves as an aggregator of radio station and other Web services. [U.S. Copyright Office, CARP Report at p. 60 (February 2002)] The CARP has in effect bootstrapped a recommend non-commercial royalty fee from a commercial rate that is also bootstrapped.

If KXUL attracted the same size audience to its Internet retransmissions as it does over the air [*supra*, at p. 3], the digital rights fees recommended by the CARP for KXUL would total more than $15,750.00 per year. Thus, the digital rights fees KXUL would pay for an audience equal in size to its present over-the-air listenership would represent 22% of the station's annual budget, not including additional new royalty fees sought by performance rights organizations and not factoring in KXUL's massive costs for complying with the proposed new copyright record-keeping requirements.

However, KXUL is not able to predict the actual net financial impact the performance royalty fees proposed by the CARP report might have on the station. The panel's recommended fee structure is based on a per-performance standard requiring steaming services to collect information KXUL cannot reasonably ascertain with the station's current resources. In order to comply with the proposed fee system, KXUL would be forced to acquire additional software to analyze the station's Internet server logs. The KXUL faculty supervisor contacted three vendors

– Lariat Software, NetIQ, and Sane Solutions – in order to determine the costs of complying with the standard. The software necessary for KXUL to be able to minimally determine fees proposed under the CARP report would cost the station approximately $3,000. Even after incurring such an expense, KXUL would lack the software resources necessary to comply with recordkeeping rules proposed by the Copyright Office, to be discussed below. [*infra*, at p. 18]

NPR and the RIAA reached a confidential settlement agreement during a period the Copyright Office suspended the CARP proceedings, between November 9, 2001 and December 2, 2001. This agreement affects only the services of NPR, its member radio stations, and non-member radio stations which are eligible to receive federal funding from CPB. The CARP report makes reference to several private agreements with commercial broadcasters, and includes multiple redacted passages from such confidential agreements; however, the panel makes absolutely no references to terms or rates under the NPR/RIAA agreement. The NPR/RIAA agreement is a likely indicator of reasonable rates for the universe of non-commercial radio stations that are not CPB funded, yet the CARP made no apparent use of this information. Congress should also note that while digital performance royalty fees attributable to the stations covered by the NPR/RIAA agreement are funded by federal taxpayer monies administered through CPB, non-commercial educational stations not financed by CPB must pay the new statutory license royalty fees from already meager self-generated budgets.

Congress has also required the Copyright Office to establish a minimum royalty fee for digital performances. [17 USC §114(f)(2)(B)] Although the CARP report recommends reduced fees for non-commercial educational stations' simulcast retransmissions, archived programming, substituted programming, and limited side channel transmissions, its does not establish a minimum non-commercial fee distinct from the minimum fee applied to commercial entities.

Despite Congress' intention to provide the opportunity for all entities performing sound recordings to participate in the CARP hearings, in reality not all that wished to could. Student-operated radio stations do not have the necessary experience or legal sophistication to represent themselves before such proceedings, and do not have benefit of the financial resources to employ "extraordinarily able counsel." The voluntary negotiation periods and CARP hearings combined have lasted longer than undergraduate students working at KXUL have been enrolled at the university, which disadvantages these students and the station in these important and complicated legal matters. At this writing the Librarian has yet to accept the recommendations of the CARP panel, and as of March 11, 2002 several CARP participants already petitioned the Librarian to void the CARP pronouncement. Regardless of the Librarian's decision, it is self-evident that not all parities having to abide by the judgment of the rate adjustment proceeding have enjoyed an equal voice in its outcome.

C. SECTION 112 EPHEMORAL COPIES

The issue of ephemeral copies is discussed at length in the Copyright Office report to Congress required under Section 104 of the DMCA. We will not repeat here the entirety of the findings and recommendations contained in that report, but we will comment on the issue in order to amplify the need for Congressional remediation with regard to the law of copyright as it addresses ephemeral copies.

The process of streaming audio over the Internet includes the creation of incidental buffer copies temporarily stored in a computer's volatile Random Access Memory (RAM). Upon a review of the record the Copyright Office ruled that, for the purposes of the statute, the making of such copies remains the exclusive right of the copyright owner, no matter that the creation of these reproductions occurs automatically and that the process is transparent to the user, or that these copies persist only momentarily. After a lengthy study of statutory, legislative, judicial,

and international treaty precedent, the Copyright Office suggested amending the statute to specify that temporary copies incidental to a licensed digital performance result in no royalty liability:

> We recommend that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work. [U.S. Copyright Office, DMCA Section 104 Report at pp. 142-143 (August 2001)]

However, the CARP later arbitrating royalty fees for digital performances felt compelled by Congress to set a rate for such buffer copies:

> Whatever the Panel's private views regarding the merits of this policy debate (and the Panel affords great weight to the views of the Copyright Office professionals who have developed considerable expertise in these matters), this policy determination must be made by the Congress, not by the Panel. Unless and until Congress amends the current statute, the Panel's duty is clear: the Panel's responsibility is to follow the current Congressional mandate set forth in §112(e)(4) and determine a separate rate for ephemeral copies. [U.S. Copyright Office, CARP Report at pp. 98-99 (February 2002)]

We concur with the Copyright Office's statement of need for a statutory blanket exception of royalty fees attributable to the creation of temporary digital buffer copies of musical works incidental to the public performance of a sound recording. We also note the Copyright Office's observation that "[t]he same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right." [U.S. Copyright Office, DMCA Section 104 Report at p. 143 (August 2001)] The copyright owners' claim to – and the panel's granting of – an ephemeral license fee for Internet streaming as a part of the CARP proceedings validates this concern:

> For the making of all ephemeral recordings required to facilitate their internet transmissions, each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster shall pay a §112(e) royalty equal to 9% of their total performance royalty. [U.S. Copyright Office, CARP Report Appendix B at p. B-7 (February 2002)]

As a result of the CARP's interpretation of the current statute, copyright owners will be compensated twice for the very same performance, despite the Copyright Office's conclusion that "[t]he buffer copies have no independent economic significance." [U.S. Copyright Office, DMCA Section 104 Report at p. 143 (August 2001)]

Copyright issues related to ephemeral copies are not limited to the appropriateness of the royalty fee; the Copyright Office has also proposed extensive recordkeeping requirements for the use of such temporary copies. [*infra*, at p. 18] The Copyright Office Notice of Proposed Rulemaking (NPRM) will be discussed more generally in a subsequent section of these comments, but here we will address the proposed recordkeeping requirements specifically applicable to ephemeral copies.

The Copyright Office NPRM released February 2, 2002 proposes rules requiring streaming services to generate an "Ephemeral Phonorecord Log" listing as many as thirteen (13) pieces of information for each buffer copy created, and another thirteen (13) pieces of information once each of these copies is destroyed. Some of this information duplicates data required elsewhere in a proposed "Intended Playlist." Other figures, such as dates ephemeral phonorecords are created and destroyed, are not available to streaming services because – as the Copyright Office's own record indicates – the generation of these buffer files occurs automatically, the process is transparent to the user, and no record of these files is typically created. The proposed ephemeral recording recordkeeping rules require the collection of copyright notice information from the original sound recording, although the 1989 Bern Convention for the Protection of Literary and Artistic Works (Berne) does not require this information to be listed on sound recordings. Comments we have filed with the Copyright Office in response to the NPRM detail these and other shortcomings of the proposed recordkeeping requirements.

KXUL has participated in the NPRM process to voice our opposition to the proposed ephemeral recordkeeping requirements. Although the close scrutiny of an NPRM such as this is likely beyond the intent of the Subcommittee's current request for public comment, we feel obliged to raise the issue to bring awareness of the onerous requirements potentially arising as a result of the current statute, in addition to our concern associated with the ephemeral royalty fee itself. Past actions by the Copyright Office reflect a strict application of the explicit instructions of Congress; only specific additional legislative guidance will dissuade the Copyright Office from imposing both the inappropriate ephemeral copy royalty fee and the associated oppressive recordkeeping requirements. Enactment of the Copyright Office's recommended blanket exemption for temporary copies incidental to a licensed digital performance will also negate the necessity for these burdensome recordkeeping requirements.

D. RECORDKEEPING NOTICE OF PROPOSED RULEMAKING (NPRM)

An NPRM from the Copyright Office was announced on February 1, 2002, entitled "Notice and Recordkeeping for Use of Sound Recordings Under Statutory License." [67 FR 5761 (February 7, 2002)] The deadline for comments in response to this announcement was originally scheduled for March 11, 2002, but was later extended to April 5, 2002, immediately prior to the Subcommittee's own April 8, 2002 deadline for comments. KXUL cooperated with a number of geographically-diverse educational radio stations to file with the Copyright Office joint comments in response to this NPRM. Although a final ruling as a result of this NPRM cannot be expected for some time to come, the importance of this issue causes us to bring the matter before the Subcommittee, because of the very strong and unfortunate potential for the burdensome proposed recordkeeping requirements to summarily drive non-commercial educational broadcasters from the Internet.

The recordkeeping regulations the Copyright Office proposes to adopt are based on recommendations principally suggested by the RIAA. In the NPRM, the Copyright Office characterizes the RIAA proposal as "(o)n its face, the request for the Intended Playlists, Listener's Log, and Ephemeral Phonorecord Log seems reasonably based on the premise that the copyright owners need certain specific information to monitor compliance and use by the Services." [67 FR 5763 (February 7, 2002)] The RIAA additionally argues that the information it seeks is "easily provided, [] not burdensome, and in fact, is currently provided by a number of licensees who have obtained licenses through negotiations with the RIAA and/or Sound Exchange." [*Ibid.*] The NPRM also notes that "[o]ther interested parties, however, may find the requirements too stringent and burdensome in spite of RIAA's assertions." [*Ibid.*] This is indeed the case, as we will now discuss.

The proposed "Report of Use of Sound Recordings under Statutory License" would require services performing sound recordings to collect detailed information to be organized in three separate data sets. The proposed "Intended Playlist" must include a consecutive listing, compiled on a monthly basis, of ten (10) data items for every recording scheduled to be transmitted, or, in the case of a service that does not schedule transmissions in advance, eighteen (18) data items for every recording actually transmitted. The "Listener Log" under consideration would consist of seven (7) data items for each session during which a user is logged in to receive transmissions as part of the service. The anticipated "Ephemeral Phonorecord Log" will contain thirteen (13) data items for each act of creation and thirteen (13) data items for each act of destruction of ephemeral recordings under the statutory license. [67 FR 5765 (February 7, 2002)]

KXUL estimates that should the regulations be adopted as proposed, on an annual basis the station would be required to collect at least 2,365,200 data items as part of its "Intended Playlist," and more than 546,000 data items for the "Listener Log." We cannot predict the

number of data items required annually for the "Ephemeral Phonorecord Log" because the collection of this information is technologically impossible for KXUL, as previously discussed in these comments. [*supra*, at p. 17] Some of the information proposed by the RIAA and the Copyright Office to be included in the "Report of Use of Sound Recordings under Statutory License" is not available to streaming services, is not consistently available, or is redundant within the report itself; details of these discrepancies and others were noted in joint comments, in which KXUL participated, filed with the Copyright Office in response to the NPRM.

KXUL estimates 6,500 users log in to receive the station's Internet retransmissions each month, or an hourly average of approximately nine (9) sessions. KXUL does not presently have the technological capability to determine the length of each of these listening sessions. As previously noted, the largest Internet audience KXUL has witnessed is 28 simultaneous listeners. [*supra*, at p. 4] Our predictions of recordkeeping data to be generated under the proposed regulations, detailed in the previous paragraph, are based on this minute amount of use. The proposed recordkeeping requirements are monumental when compared with the level of utilization.

The proper evaluation of the proposed "Report of Use of Sound Recordings under Statutory License" rules must compare the cost of compiling the required information in relation to the amount of royalties anticipated to be collected. The use of analysis software necessary to compile the specified log information is not normally a part of the Internet operations of educational radio stations such as KXUL. This requirement would therefore necessitate KXUL's acquisition of a log analysis software system compliant with the standards proposed in these rules. However, vendors presently marketing software developed to study streaming server logs report to KXUL that no existing product will provide all of the information specified in the proposed rules, nor are any vendors developing such applications. Indeed, a representative for

software vendor Lariat Software, Inc. indicates that some of the information could not be derived from Web server reports because the requested information is not available from World Wide Web Consortium (W3C) compliant logs. A Lariat spokesperson said that vendor could develop a computer program to approximate the data specified in the NPRM for a software cost of $7-10,000 per site. Given that KXUL and other educational radio stations with relatively low levels of Internet listening activity are likely to be paying statutory license fees at or close to the minimum levels proposed by the Copyright Office, $500.00 per annum, the cost of complying with these rules is unmistakably disproportionate to the royalty fees to be assessed.

The contrast is also striking between the burden imposed by the proposed recordkeeping regulations and existing Copyright Office recordkeeping requirements applied to royalties paid by educational broadcasters to performance rights organizations (PROs). Rules for record-keeping for performances of musical compositions by public broadcasting entities licensed to colleges and universities currently state that "[a] public broadcasting entity subject to this section shall furnish to ASCAP, BMI and SESAC, upon request, a music-use report during one week of each calendar year. ASCAP, BMI and SESAC shall not in any one calendar year request more than 10 stations to furnish such reports." [37 CFR §253.5(e)] Present recordkeeping requirements for performances by educational broadcasters are based on a sampling model, whereas the proposed Internet regulations are based on a census model. The result is a proposed record-keeping requirement under the DMCA that is oppressive.

Complying with the proposed recordkeeping requirements is not a simple matter of mining the requested information from an already-existing data set. Much of the information for each musical selection would need to be specifically collected by KXUL in order to comply with these proposed rules. Educational stations such as KXUL are typified by programming representing wide ranges of musical genres. Many do not restrict playlists to a comparatively

small selection of artists and styles of music, as is common practice with our commercial counterparts, but instead we explore compositions from vast, diverse music libraries. Music libraries of educational radio stations are frequently comprised of literally tens of thousands of compositions. This programming diversity creates an additional demand, under RIAA's proposed recordkeeping rules, that would discourage, if not eradicate, the ability of educational broadcasters to provide this non-subscription service through Internet retransmissions.

Although KXUL utilizes computer technology to a greater extent than is typical of student-operated educational radio stations, much of the massive recordkeeping required by these rules would have to be generated manually by a small staff of volunteer personnel, by our station and by most other educational stations. Established trends experienced by the PROs illustrate the likely penetration of computerized reporting by educational stations under the proposed recordkeeping requirements is quite small; BMI presently allows its PRO reporting logs to be filed in electronic form, but estimates the number of stations not submitting handwritten logs is less than 10% of those submitting reports. The proposed digital performance recordkeeping rules mandate the computerization of this process, and the incalculable attendant costs for the acquisition of hardware and software. The much greater volume of information to be collected under the proposed rules could easily prove to be overwhelming to manage, both for the educational broadcasters and for the copyright owners.

The private NPR/RIAA agreement previously mentioned addresses both rate issues and reporting requirements, as noted in the CARP report: "The parties also reached an accord respecting all non-rate terms...." [U.S. Copyright Office, CARP Report at p. 17 (February 2002)] Although the complete terms of this agreement remain confidential, one provision that is generally known fully exempts CPB-funded educational radio stations with fewer than ten (10) full-time employees from reporting requirements associated with programming simultaneously

broadcast over-the-air and retransmitted via the Internet. The Copyright Office fails to note this exception in the recordkeeping NPRM, although this exclusion is obviously relevant to the recordkeeping issue. RIAA's acceptance of this term for CPB-funded educational radio stations indicates its implicit acceptance of this allowance as being reasonable. The same consideration should be afforded the educational radio stations least able to afford the onerous recordkeeping requirements. Amending the statute to extend this exemption to all non-commercial educational broadcasters would ensure equal, fair consideration under the law.

A universal recordkeeping exemption for the retransmissions of non-commercial would lead to savings in administrative costs for both the stations performing sound recordings and for copyright owners of those sound recordings; therefore, we believe the application of a reduced fee to these exempted services would be fair to all parties. In establishing a recommendation for a minimum fee for webcasting services, the CARP report notes that "one purpose of the minimum fee is to protect against a situation in which the licensee's performances are such that it costs the license administrator more to administer the license than it would receive in royalties...." [U.S. Copyright Office, CARP Report at p. 95 (February 2002)] The CARP adopted a fee of $500.00 per annum, the lowest negotiated by RIAA under a previous voluntary agreement, as the recommended minimum fee under the statutory license. Because this minimum fee is premised on a model designed to ensure the license administrator receives more in royalty fees than is the cost of administering the license, a reasonable conclusion follows that a reduction in administrative costs should also result in a reduction of the royalty fee; otherwise, the license administrator would realize a financial windfall as the result of such an exemption. Should Congress accept a recordkeeping exemption, the RIAA, as the designated agent to collect and distribute statutory royalties, will benefit from a reduction in the cost of administering these licenses. The CARP report set the statutory rate for non-commercial retransmissions at one-third

of the rate applied to retransmissions by commercial broadcasters. In recognition of the reduced costs of administering a simplified non-commercial license, this two-thirds reduction should also be applied to the minimum fees charged non-CPB-funded educational radio stations licensed to colleges, universities, or other non-profit educational institutions.

IV. PERFORMANCE RIGHTS ORGANIZATIONS (PROs)

Congress has previously recognized the unique characteristics of educational radio stations when crafting copyright statutes applying to broadcast performances of published musical compositions. [17 USC §118] Internet retransmissions by these same stations are merely the means to extend to additional audiences the public service already offered through their broadcast signals. Because the character of this extended service is consistent with the original broadcast programming, the rationale already applied to traditional broadcasts naturally extends to the new technology to justify distinct treatment within the statute. A Section 118 copyright license would apply to a non-commercial educational broadcaster extending its audience by means of a terrestrial radiofrequency translator, and the same should be the case for an educational broadcast retransmitted via the Internet.

Because copyright law respective to musical performances over the Internet is woefully underdeveloped, performance rights organizations have initiated the practice of issuing "experimental" licenses for these uses. KXUL ironically received an offer of such an experimental license from SESAC, Inc. on the very day the Subcommittee announced its request for public comment regarding copyright issues and the Internet. Subsequent communications reveal many other non-commercial educational radio stations received the identical instrument at about the same time. We specifically discuss the SESAC correspondence here, not because this is the only PRO exhibiting such practices, but because their approach exemplifies recent activities of

PROs in general. We highlight only two of the many issues raised by PRO experimental Internet licenses.

The amount of royalty fees is the first of the issues that are of concern regarding PRO agreements covering Internet retransmissions. Royalty fees paid by KXUL under its Section 118 license have been independently determined to be "reasonable" and representing "fair value" based on lengthy histories of Copyright Royalty Tribunal (CRT) and CARP proceedings conducted by the Copyright Office. The annual royalty fee rate KXUL must pay SESAC for 2002 for the station's broadcast performances has been set at $66.00 by the appropriate rate adjustment proceeding. [37 CFR §253.5(c)(3)] SESAC's experimental Internet license would force KXUL to pay an annual royalty fee of $3,064.00 – or 4,542% more – for the station's Internet retransmission of the very same non-commercial programming. This disparity could only be justified if KXUL's Internet audience was significantly larger than the station's over-the-air listenership. Such is not the case. The actual KXUL Internet audience is but a small fraction of its over-the-air listenership. Indeed, technological limitations restrict the concurrent Internet audience for KXUL to a maximum of less than 5% of the station's average over-the-air listenership. [*supra*, at p. 4] Clearly, then, SESAC has substantially overreached in proposing Internet performance fees for radio station KXUL.

The second issue of concern regarding PRO agreements involves reporting requirements that are inconsistent between licensing organizations, that measure uses not at all related to the licensed musical performances, or that require information not available to the streaming service. The SESAC experimental license offered to KXUL bases royalty fees on the station's reported "Page Requests." That term is defined in SESAC's document as the total number of requests for HyperText Markup Language (HTML) files for the entire Web site – which is a measure that bears absolutely no relevance to the licensed performances, but instead reflects the use of

intellectual property produced by and belonging to KXUL. The ASCAP experimental license likewise determines royalty fees based on "Web Site Transmissions," which that contract defines as "...all transmissions of content to Web Site Users from or through your Web Site...." By specifying measurements not limited to the licensed performances, the PROs' experimental license fees reflect uses of intellectual property other than the musical compositions. The PROs seek to profit from the use of KXUL's intellectual property, rather than from the use of material created by the musical artists represented by those performance rights organizations. ASCAP defines an additional term, "Web Site Sessions," as "the total number of periods that begin when a Web Site User first accesses any Web Site Transmission and end when that Web Site User has not accessed any Web Site Transmission within 10 minutes." Like several of the DMCA recordkeeping requirements previously discussed [*supra*, at p. 18], the "Web Site Sessions" ASCAP defines is information KXUL cannot produce. The BMI "Web Site Music Performance Agreement" – with fees based entirely on a revenue model, rather than on measured uses – requires a comprehensive quarterly Music Use Report, to be submitted in electronic form, detailing a collection of information KXUL cannot provide.

PROs have taken advantage of their monopolistic standing – educational broadcasters can obtain blanket licenses only from the PROs, and the repertoire represented by each PRO is unique from the others – to strip-mine the Internet frontier. Without guiding regulations, PROs are not required to justify royalty fee schedules, recordkeeping demands, or other terms contained in the experimental licenses. Non-commercial educational broadcasters are particularly susceptible to the predatory tactics of the PROs.

V. RECOMMENDATIONS

The Subcommittee's call for comments asked for "meaningful solutions to address identifiable harms." We trust that the Subcommittee will recognize the real potential for

considerable harm resulting from the issues we have discussed, and we now present these recommended solutions:

A. SECTION 114 CONTENT RESTRICTIONS

As an acknowledgement of the public value provided by the educational and cultural programming of non-commercial educational broadcasters, we ask that Internet retransmissions by these services be exempted from content restrictions imposed by the DPRA and the DMCA. Our recommendation applies to CPB-funded public radio stations and non-CPB non-commercial educational stations alike. 17 USC §114(d)(2)(C) currently begins:

> in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by the service on July 31, 1998 –

We recommend this passage be amended by striking " – " and inserting the following:

> , except that this requirement shall not apply in the case of a nonsubscription retransmission made by or on behalf of any noncommercial educational broadcast station as defined in section 397 of title 47 –

B. SECTION 114 ROYALTY FEES

We request that the Subcommittee review 17 USC §114(f)(2)(B) and consider providing the Copyright Office with additional guidance to explicitly regard retransmissions of non-commercial educational broadcast stations as a specific class of service under the rules, and to expressly allow the Copyright Office to:

1. Establish a distinct royalty rate structure for retransmissions made by or on behalf of any non-commercial educational broadcast station.
2. Establish a distinct minimum royalty rate for retransmissions made by or on behalf of any non-commercial educational broadcast station.

3. Exempt or significantly reduce recordkeeping requirements for retransmissions made by or on behalf of any non-commercial educational broadcast station with fewer than ten (10) full-time employees. In the event of such a recordkeeping exemption, the Copyright Office should be directed to determine an appropriate fee, reduced from the regular minimum fee applied to retransmissions by other non-commercial educational broadcast stations.

We additionally request the Subcommittee to investigate the private NPR/RIAA agreement to determine if non-CPB educational broadcast stations might be appropriately served by further terms and allowances contained therein.

C. CHAPTER 8 COPYRIGHT ARBITRATION PANELS

We respectfully ask the Subcommittee to develop amendments to Chapter 8 of Title 17 designed to ensure necessary non-profit parties are not excluded from future copyright arbitration proceedings because of prohibitive financial costs. The record clearly demonstrates that the arbitration panel can be seriously hampered in arriving at a fair and reasonable determination without the complete participation of all of the parties affected. Important perspectives have not been allowed an equitable voice under the current statute and regulations.

D. SECTION 112 EPHEMORAL COPIES

The Copyright Office report to Congress required under Section 104 of the DMCA recommended Congressional action to amend the Copyright Act to eliminate any liability for royalty fees arising from the use of temporary buffer copies that are incidental to a licensed digital transmission of a public performance of a sound recording. We are of the same mind with this recommendation by the professionals within the Copyright Office and we ask the Subcommittee to develop appropriate corrective legislation.

E. SECTION 118 LICENSES

We propose an amendment to Section 118 to extend licenses currently applicable to non-commercial educational broadcasters to also cover the expanded service of these stations accomplished by means of Internet retransmissions. 17 USC §118(d)(1) currently reads:

> performance or display of a work by or in the course of a transmission made by a noncommercial educational broadcast station referred to in subsection (g); and

We suggest this passage be amended by striking "; and" and inserting the following:

> , or the performance or display of a work by or in the course of a nonsubscription digital retransmission of such a noncommercial educational broadcast station; and

This amendment extends the present statutory PRO broadcast performance license to the retransmissions by non-commercial educational broadcasters.

VI. CONCLUSION

The RIAA has the duty to protect the intellectual property owned by their member recording companies and, because of its status as a Congressionally-sanctioned designated common agent [17 USC §114(e)(2)(A)], the intellectual property of musicians in general. The PROs likewise are each obligated to protect the interests of their client artists. There is no doubt that recording company profits are negatively affected by various forms of piracy in the Digital Age; however, there is absolutely no evidence that Internet retransmissions by KXUL and other non-commercial educational broadcasters erode copyright owners' earnings in any way. If anything, the retransmissions by non-commercial educational radio stations enhance profits for recording companies, musicians, composers, and lyricists.

We generally agree with the premise that writers, recording artists, and recording companies should each be paid fair and reasonable compensation – in the form of financial payments or in promotional value – for the public performances of their works. The current

statute is insufficient to ensure copyright royalty regulations and attendant fees are both fair and reasonable for each the copyright owners and digital services such as KXUL that perform licensed recordings. Shortsighted legislation, albeit well intentioned, easily has the potential to halt this new medium in its infancy.

All Internet programming suppliers, other than the RIAA member major recording companies themselves, are likely to be mightily challenged in the economic environment created by the present language of the Copyright Act. The Internet retransmissions of non-commercial educational broadcasters operating without federal funding will be decimated with the anticipated implementation of the current language within the statute. Without changes, the Copyright Act will force radio station KXUL to cease its Internet retransmissions. Numerous other non-commercial educational broadcasters will fare no better. The resulting reduction of Internet content providers will appreciably diminish the diversity of services and will lessen consumer choices.

Congress can easily follow precedent to enact an evenhanded and practical solution that will ensure all non-commercial educational broadcasters are able to continue providing valuable public service, while still guarding the financial welfare of the copyright owners.